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14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 No. \_\_\_\_\_

17 JEROME BEARD,

18 Plaintiff,

19 v.

20 INTERNATIONAL BUSINESS  
21 MACHINES CORPORATION,

22 Defendant.

**COMPLAINT**  
(Jury Trial Demanded)

23 Plaintiff Jerome Beard, complaining of the acts of Defendant International Business  
24 Machines Corporation (“IBM”), alleges and states the following:

25 **INTRODUCTION**

26 1. This case comes down to one thing: IBM doesn’t pay what it owes to sales  
27 representatives. In this case, IBM discriminated against Jerome Beard based on his race when it  
28

1 paid similarly situated white employees full commissions but not him; and IBM illegally capped  
2 Mr. Beard's commissions in order to limit his income, directly contrary to their promises to him.

3         2. For years, IBM has perpetrated an institutional bait-and-switch with how it pays  
4 commissions to sales representatives. Throughout IBM's messaging to them, from how it directs  
5 managers to explain commissions to how it uses presentations to cover the program features, IBM  
6 consistently and repeatedly represents that commissions are uncapped. Indeed, IBM's Rule  
7 30(b)(6) witness admitted under oath in a deposition in a similar lawsuit that IBM has "an  
8 obligation" not to cap sales representatives' commissions payments, and that it is reasonable for  
9 sales representatives to rely on those representations.  
10

11         3. IBM tells sales representatives that "[they] can make a million dollars!" and that  
12 their income is limited only by how much they are able to sell. But that's not the truth. The truth is  
13 that IBM frequently does cap commissions.  
14

15         4. IBM intentionally misleads sales representatives about the program because it  
16 knows that an "uncapped commissions" program is highly motivating to sales representatives and  
17 incentivizes them to pursue big deals. On the contrary, capping commissions de-motivates sales  
18 representatives because when they reach the cap they can't earn any more commissions no matter  
19 how big the deal is. And, since a big deal is often extraordinarily difficult to close, requiring long  
20 hours and repeated out-of-town travel, IBM knows that being honest about its capped  
21 commissions program would significantly limit the number of those big deals.  
22

23         5. For years, IBM has known that sales representatives, and even managers, believe  
24 IBM when it says commissions are uncapped. In fact, the IBM department that handles capping  
25 frequently gets calls from sales representatives and managers that are upset about getting capped  
26 after being told that IBM does not cap commissions. Yet, IBM does nothing to attempt to  
27 eliminate the problem by explaining its real practice.  
28



1           14.     Venue is proper in this Court. Mr. Beard has resided in this District during the time  
2 relevant to this complaint and a substantial part of the events giving rise to the claims occurred in  
3 this district. IBM has maintained offices and conducted business in the District during the relevant  
4 time period.

5           15.     This action has been brought within all applicable statute of limitations and/or  
6 repose.  
7

8                                   **FACTUAL ALLEGATIONS**

9           16.     Mr. Beard is a seasoned software sales representative that joined IBM soon after he  
10 graduated college in 1983.

11           17.     During his tenure with IBM, Mr. Beard has been a successful and highly respected  
12 sales representative. He has exceeded his assigned sales quota every year since 2009. He has  
13 received positive ratings in every performance review. He has received numerous awards for  
14 100% quota club (meaning he met or exceeded his quota) and received Best of IBM top 1,000  
15 Employees awards in 2016 and 2017.  
16

17           18.     In 2017, Mr. Beard's compensation as an IBM sales representative consisted of a  
18 base salary paired with uncapped commissions. He was assigned a revenue target incentive. His  
19 commission compensation was tied to the percentage of the target incentive he attained and the  
20 commission amount that could be earned was uncapped.  
21

22           19.     During his time at IBM, Mr. Beard and other sales representatives regularly  
23 received PowerPoint presentations describing the terms of the commission plans being offered to  
24 them. These PowerPoints consisted of over 200 slides, and are collectively referred to as the  
25 "Educational Materials."

26           20.     Each year, the Educational Materials explained that sales commissions are  
27 uncapped. Nowhere do the Educational Materials state, or even suggest, that sales commissions  
28

1 are subject to being capped. The Educational Materials are unequivocal and state repeatedly that  
2 commissions are uncapped.

3         21. Mr. Beard's commission plan for the second half of 2017 ran from July 1, 2017  
4 through December 31, 2017. Several weeks into the second half of 2017, IBM sent an (electronic)  
5 document to Mr. Beard which IBM refers to as an "Incentive Plan Letter" or "IPL."

6         22. During the same time period in 2017, Mr. Beard received and reviewed a  
7 presentation (the "PowerPoint") which constituted a portion of the Educational Materials for the  
8 second half of 2017. IBM also made the PowerPoint available to Mr. Beard, and other sales  
9 representatives, for download throughout the sales period (July-December 2017) and afterwards,  
10 as a resource that they could continually refer back to if they had questions about their  
11 commissions. This PowerPoint constitutes a continuing representation by IBM to sales  
12 representatives, including Mr. Beard, of the terms of their commission compensation. (IBM made  
13 a substantially similar version of this PowerPoint available to sales representatives, including Mr.  
14 Bear, each year for the purpose of explaining the important terms of his compensation.)

15         23. The 2017 IBM's PowerPoint presentation begins as follows:  
16

17         Welcome. This incentive plan Quickview presentation is the **primary 2017**  
18 **education** for IBM sales employees and managers. **It covers the information you**  
19 **will need to understand your 2017 plan.**

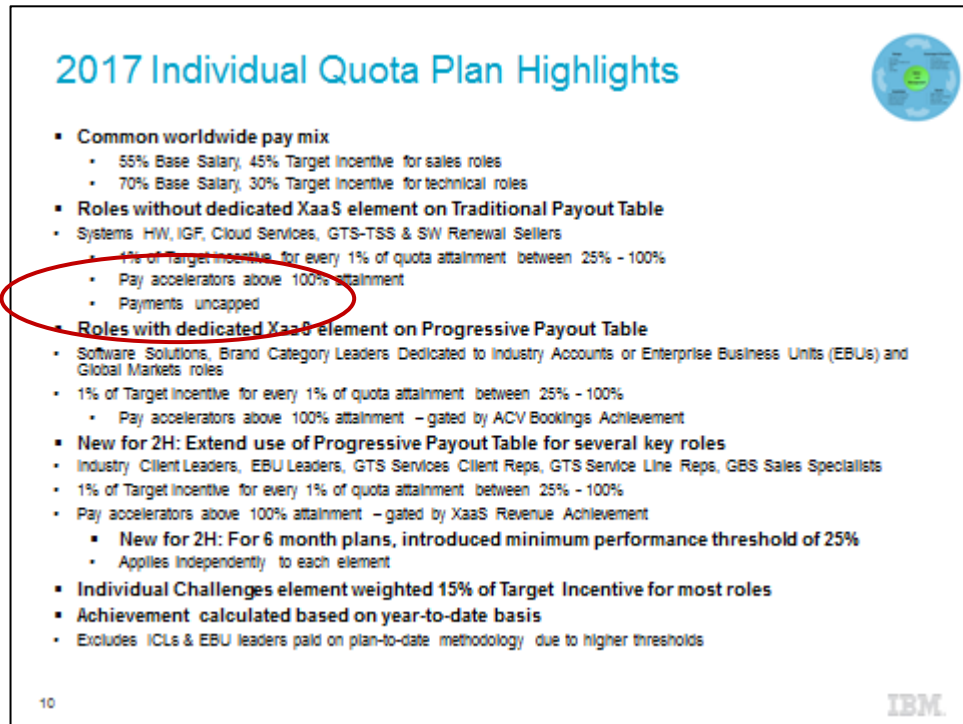
20         Based on positive responses to this type of on-demand, self-service education on  
21 Incentives Workplace, we are once again delivering both manager and employee  
22 incentive plan education in this format. In addition, managers are encouraged to  
23 hold team meetings with their employees to discuss their 2017 incentive plan and  
help further ensure employee understanding.

24         Let's get started.

25 (emphasis added).


26         24. The PowerPoint was entitled "Your 2017 Incentive Plan" "Individual Quota Plan  
27 (IQP) – Employees" and it stated that the goal of the incentive plan is "to ensure that our  
28

incentives plans were competitive, if not best-in class” In particular, page 10 of the PowerPoint reads as follows:



### 2017 Individual Quota Plan Highlights

- **Common worldwide pay mix**
  - 55% Base Salary, 45% Target Incentive for sales roles
  - 70% Base Salary, 30% Target Incentive for technical roles
- **Roles without dedicated XaaS element on Traditional Payout Table**
  - Systems HW, IGF, Cloud Services, GTS-TSS & SW Renewal Sellers
  - 1% of Target Incentive for every 1% of quota attainment between 25% - 100%
  - Pay accelerators above 100% attainment
  - **Payments uncapped**
- **Roles with dedicated XaaS element on Progressive Payout Table**
  - Software Solutions, Brand Category Leaders Dedicated to Industry Accounts or Enterprise Business Units (EBUs) and Global Markets roles
  - 1% of Target Incentive for every 1% of quota attainment between 25% - 100%
    - Pay accelerators above 100% attainment – gated by ACV Bookings Achievement
- **New for 2H: Extend use of Progressive Payout Table for several key roles**
  - Industry Client Leaders, EBU Leaders, GTS Services Client Reps, GTS Service Line Reps, GBS Sales Specialists
  - 1% of Target Incentive for every 1% of quota attainment between 25% - 100%
  - Pay accelerators above 100% attainment – gated by XaaS Revenue Achievement
    - **New for 2H: For 6 month plans, introduced minimum performance threshold of 25%**
    - Applies independently to each element
- **Individual Challenges element weighted 15% of Target Incentive for most roles**
- **Achievement calculated based on year-to-date basis**
  - Excludes ICLs & EBU leaders paid on plan-to-date methodology due to higher thresholds

10 

Under “2017 Individual Quota Plan Highlights,” each of the bullet points highlights how commissions are paid during the 2H 2017 sales period for various sales roles, with the role applicable to Mr. Beard stating clearly **“Payments uncapped.”** (emphasis added). In fact, the presentation mentions no less than fourteen times in its 27 pages that “payments” and/or “earnings opportunit[ies]” are “uncapped.”

25. Moreover, IBM represented to Mr. Beard and its other sales representatives that **“Seller earnings for these plans are uncapped and the plan is paid based upon achievement results rather than on an assessment of employee contribution.”** (emphasis added).

26. These representations were repeated in sales meetings that Mr. Beard attended and by IBM managers to Mr. Beard.

1           27.     Indeed, even IBM's written guidance to its managers for dealing with situations in  
2 which an adjustment may be made based on errors or other issues makes it blindingly clear that no  
3 caps are allowed:

4           Conditions that may lead to an adjustment include the need to correct errors or the  
5 need to balance with employee's contribution to the success of a large sales  
6 transaction (which criteria must be clearly provided to Commissions team).

7           **Adjustments must not be done only as a ceiling or cap on the total earnings**  
8 **allowable to employees.**

8 (emphasis added).

9           **Mr. Beard's Commission Payments Were Capped.**

10           28.     In 2017, Mr. Beard worked hard to close two large IBM products and services  
11 deals with HCL America, Inc. ("HCL"). The first deal closed September 30, 2017 (the "September  
12 HCL deal"), and the second one closed December 30, 2017 (the "December HCL deal"). The  
13 revenue subject to commission generated by Mr. Beard from these deals totaled \$25,200,000, with  
14 the September HCL deal composing \$13,200,000 of that total amount and the remaining  
15 \$12,000,000 in revenue coming from the December HCL deal.

16           29.     Based on these sales of \$25,200,000 in commissionable revenue, Mr. Beard earned  
17 \$2,901,806 in commissions from the two HCL deals. IBM, however, refused to pay him this  
18 amount, even though his managers thought he should have been paid in full and signed off on full  
19 payment to him.  
20

21           30.     After the September HCL deal closed on September 30, information regarding Mr.  
22 Beard's commissions was sent to his first line manager (Greg Mount), then his second line  
23 manager (Scott Kingston), and his third line manager (Dave Mitchell) for their approval. All three  
24 approved the payment of commissions to Mr. Beard on or by October 19, 2017.  
25  
26  
27  
28

1           31. Based upon these approvals, IBM's internal commissions dashboard showed  
2 commissions earned and to be paid to Mr. Beard of approximately \$1,400,000 for the September  
3 HCL deal.

4           32. After all three members of Mr. Beard's management team had all approved this  
5 commission payment, and the internal commissions dashboard reflected that he would be paid in  
6 full for the September HCL deal, an individual from the finance department at IBM emailed Beard  
7 and told him that the September HCL deal was going through an additional review. Supposedly,  
8 this review was being performed with respect to all aspects of the deal, and as to all individuals  
9 who were involved in the deal to ensure accuracy. As a result of the review, Mr. Beard was  
10 informed that his payment would be delayed until the review was completed.

11           33. On November 16, 2017 Mr. Beard received an email from his first line manager,  
12 Mr. Mount, informing him that IBM had concluded its review and decided it would only attribute  
13 \$2,000,000 worth of credit to Mr. Beard for the September HCL deal (instead of the actual  
14 revenue of \$13,200,000).  
15

16           34. In oral communications with Mr. Mount and Mr. Kingston, the only basis provided  
17 to Mr. Beard for IBM's decision to attribute only \$2,000,000 worth of revenue credit to Mr. Beard  
18 was that the actual revenue credit of \$13,200,000 generated a higher commission due to Mr. Beard  
19 than IBM was willing to pay him. He was not provided any substantive basis beyond that. Based  
20 on this \$2,000,000 revenue credit, Mr. Beard was paid a commission of \$205,286 in November  
21 2017.  
22

23           35. While this process was playing out, Mr. Beard was hard at work trying to close a  
24 second deal with HCL for additional IBM software licenses. He successfully closed this second  
25 deal with HCL on December 30, 2017. Like the first HCL deal, this deal was the culmination of  
26 years worth of relationship building and hard work, and required significant amounts of travel  
27  
28



1 across the country and time away from his family. When this deal closed on December 30, 2017,  
2 Mr. Beard expected to receive the full revenue credit for his sale of \$12,000,000. However, again,  
3 after the deal was closed IBM inexplicably refused to credit him for the full amount. This time,  
4 they again arbitrarily chose to only allocate \$2,000,000 worth of revenue credit to him without  
5 even performing any type of review or notifying Mr. Beard. This was done for the sole purpose of  
6 lowering the commissions IBM had to pay Mr. Beard.  
7

8 36. After this second cap on his commissions payment, Mr. Beard was paid a total of  
9 \$410,572 out of the \$2,901,806 that he is owed, leaving a balance due of \$2,491,234 on both the  
10 September HCL deal and the December HCL deal.

11 37. HCL had been a client of Mr. Beard's since early 2015. He spent countless hours  
12 building relationships with representatives of HCL, often traveling to Boston and New York City,  
13 that were invaluable to getting the two deals closed in 2017.  
14

15 38. The only reason Mr. Beard was ever provided by IBM for why he was not paid all  
16 of the commissions he had earned, was that IBM thought it was simply too much money to pay  
17 Mr. Beard, and thus, it was unwilling to pay him in full.

18 39. This reasoning did not make any sense to Mr. Beard as he had clearly been  
19 promised uncapped commissions; and, in fact, Mr. Beard had earned nearly a million dollars  
20 worth of uncapped commissions the previous year and been paid everything that he earned.  
21

22 40. Indeed, despite closing many large deals throughout his IBM career, Mr. Beard had  
23 *never* had his commissions capped before.

24 41. During the same sales period, two of Mr. Beard's peers (both white) closed deals  
25 substantially similar to Beard's deals but each were paid in excess of \$1,000,000 in sales  
26 commissions. This glaring discrimination was called out to IBM's attention by one of Mr. Beard's  
27 managers, Scott Kingston. Not only did IBM ignore it and refuse to reverse the cap on Mr.  
28

1 Beard's commissions, IBM doubled down by firing Mr. King in retaliation and refusing to pay  
2 him his own commissions!

3 **IBM Has Admitted It Has An Obligation Not to Cap Commissions**

4 42. The sales field in which Mr. Beard worked for IBM is highly competitive, and most  
5 employers do not cap commissions. Were IBM to actually tell its salespeople that commissions  
6 could be capped, it would be severely hampered in its efforts to recruit good salespeople. As a  
7 result, IBM engages in a practice whereby it tells its salespeople that their commissions will not be  
8 capped, both verbally and in written documents like the PowerPoint presentation, and then it caps  
9 certain high-achievers after the fact.

10  
11 43. There is another case that was recently resolved in the Middle District of North  
12 Carolina that is very similar to this one, Bobby Choplin v. International Business Machines  
13 Corporation, No. 16-cv-1412-TDS-JEP ("the Choplin Action"). Upon information and belief, the  
14 plaintiff in the Choplin Action had an IPL that was in relevant part identical or substantially  
15 similar to Mr. Beard's IPL. Like Mr. Beard, the plaintiff was provided a PowerPoint presentation  
16 that was in relevant part identical or substantially similar to the PowerPoint presentation shown to  
17 Mr. Beard. Furthermore, upon information and belief, many of the other facts and circumstances  
18 surrounding the commissions due to Mr. Choplin, and what IBM actually paid him and why, are  
19 similar to the facts and circumstances surrounding the commissions due to Mr. Beard, and what  
20 IBM actually paid him and why.

21  
22 44. In the Choplin Action, the plaintiff took four depositions: (1) a Rule 30(b)(6)  
23 deposition of IBM, through corporate designee Richard Martinotti (**Exhibit A**); (2) a deposition of  
24 Mr. Choplin's first-line (i.e., immediate) manager, Thomas Batthany (**Exhibit B**); (3) a deposition  
25 of Mr. Choplin's second-line (i.e., two levels up) manager, Haleh Maleki (**Exhibit C**); and (4) a  
26 deposition of Mark Dorsey, a former IBM Vice President of Software Sales (i.e., one of the  
27  
28

1 highest-level sales managers in the corporation) (**Exhibit D**). Together, Exhibits A, B, C, and D  
 2 are referred to as the “Choplin Depositions.” All of this testimony taken under oath in the Choplin  
 3 case, including the testimony quoted below, applies equally and fully to Mr. Beard here.

4           45. The testimony in the Choplin Depositions make clear the following, among other  
 5 things: (1) because of the statements in the PowerPoints, and in light of the IPLs, IBM had an  
 6 “obligation” not to “cap” the commission for salespeople like Mr. Choplin and Mr. Beard; (2)  
 7 salespeople like Mr. Beard were entitled to rely on the statements in the PowerPoints that their  
 8 commissions would be not be “capped,” and that reliance was understood by IBM and was  
 9 reasonable; and (3) what IBM in fact did, when it reduced the commissions in the way that it did  
 10 for Mr. Choplin and Mr. Beard, was “capping.” For example:

11           a. IBM testified as follows:

12                   Q. The fourth bullet point, you could read that, please.

13                   A. “Earnings opportunity remains uncapped.”

14                   Q. Okay. So you would agree that IBM when explaining his  
 15 compensation plan for the first half of 2015 represented to  
 16 Bobby Choplin that his earnings opportunity remains uncapped,  
 17 wouldn’t you?

18                   A. Correct.

19                   Q. Would you also agree that IBM represented to Bobby Choplin  
 20 regarding his first half of 2015 compensation plan that payments  
 21 were uncapped?

22                   A. Correct.

23                   Q. So would you agree that IBM had an obligation not to cap Bobby  
 24 Choplin’s earnings opportunity?

25                   A. Yes.

26                   Q. Would you agree that IBM had an obligation not to cap Bobby  
 27 Choplin’s payments?

28                   A. Correct.

1 (Exhibit A, pp. 18-19.) When asked specifically about whether a salesperson could reasonably  
2 rely on the statements in the PowerPoints, IBM testified:

3  
4 Q. And it would be reasonable for a salesperson like Bobby Choplin  
5 to rely on the information in Exhibit 65, 66 and 67  
[PowerPoints] regarding their compensation plan?

6 A. Yes.

7 (Exhibit A, pp. 67-68.)

8 b. Mr. Batthany testified as follows about the statements in the PowerPoint that commission  
9 would be not be capped:

10  
11 Q. Okay. It would be reasonable for someone to understand that  
12 their commission payments were uncapped in the first half of  
2015, wouldn't it?

13 A. Yes.

14 (Exhibit B, p. 79.) Mr. Dorsey similarly testified that, if he were a salesperson and read the  
15 statements in the PowerPoint, he would think that his earnings were uncapped. (Exhibit D, p. 48.)

16 c. Ms. Maleki testified as follows about what exactly constitutes capping:

17 Q. What does that mean to you?

18 A. Capped?

19 Q. Right.

20 A. Is when your commissions get reviewed, and you know, you're  
21 supposed to get paid X amount, but you get paid Y.

22 Q. Something different than what your commission formula would  
23 produce?

24 A. Correct.

25 (Exhibit C, p. 25.)

26 d. Mr. Dorsey straight-up testified that IBM's statements in the PowerPoints that it did  
27 not cap were not true, and that IBM often capped:  
28

1 Q. Okay. Would you agree that under the commissions programs at  
2 IBM while you were there from the 2013 to 2015, that a  
software salesperson's earnings opportunity was uncapped?

3 A. No. I don't think any -- I don't think since I was there that their  
4 earnings were ever uncapped.

5 ...

6 Q. And you see that each of these under the earnings opportunity  
7 block on the left side of the page, the third bullet point says,  
"Earnings opportunity remains uncapped"?

8 A. I do see that.

9 Q. And that's each of these four, on page 83, page 84, page 85, page  
10 86, every single one of these says, "Earnings opportunity  
remains uncapped"; is that correct?

11 A. That's what I'm seeing, yeah.

12 Q. But that's not true from what you remember at IBM?

13 A. That's correct. I don't believe that's true.

14  
15 (Exhibit D, pp. 43, 46-47.)

16 46. The Choplin Depositions also make clear that, despite IBM's claim that it did not  
17 "cap" Mr. Choplin's commission when it reduced his commission payments, IBM employees used  
18 that exact term several times in emails when discussing the reduction in Mr. Choplin's  
19 commission payments. Upon information and belief, when referring to its reduction of Mr.  
20 Beard's commission payments, also referred to what it was doing as "capping," "capped," "cap,"  
21 or the like, including in emails sent during the period when IBM reduced Mr. Beard's  
22 commission.

23  
24 47. Indeed, an email was produced in the Choplin case where Randolph Moorer  
25 specifically "recommend[ed] capping" the commissions of another sales representative, Mr.  
26 Stephenson, on both the LabCorp and BB&T Deals by approximately \$600,000. (**Exhibit E**).

27 48. Mr. Beard has met all conditions precedent to the bringing of this action.  
28

**FIRST CLAIM FOR RELIEF**  
**(Violation of California Labor Code)**

49. Plaintiff re-alleges and incorporates the prior paragraphs of this Complaint as if fully set forth herein.

50. Plaintiff earned commission wages within the meaning of California Labor Code Sections 200 and 204.1.

51. IBM has knowingly, intentionally, and willfully failed and refused to pay to Plaintiff the full and complete amount of commissions he earned. IBM has operated under and continues to operate under a common policy and plan of failing and refusing to pay full earned commissions through the operation of its re-plan practices.

52. Every half year, IBM provides Plaintiff a compilation of written materials that specify the way Mr. Beard's commissions will be computed and paid for that half year. Mr. Beard acknowledges receipt of each time. These compensation plans provide, among other things, that IBM will pay Mr. Beard commissions based on sales credited to Mr. Beard in accordance with the commissions set forth in his compensation plan and that the sales commissions are uncapped.

53. Mr. Beard has performed all of the duties and obligations required of him by IBM that would entitle him to receive commissions. He has met all lawful conditions precedent to the earning of commissions. IBM has credited Plaintiff for sales that are encompassed by his compensation plan.

54. IBM relies on provisions in the compensation plan that purport to allow IBM to retroactively change commission terms at any time. These provisions are void and unenforceable exculpatory clauses under California Civil Code Section 1668.

55. Furthermore, these provisions that purport to allow IBM to retroactively change commissions terms at any time are unlawful, void, and unenforceable under California Labor Code Sections 221, 223, and 2751.

1           56. Labor Code Section 221 states: “It shall be unlawful for any employer to collect or  
2 receive from an employee any part of wages theretofore paid by said employer to said employee.”  
3 California’s Industrial Welfare Commission Wage Orders prohibit employers from using earned  
4 wages to offset ordinary business costs.

5           57. Labor Code Section 223 states: “Where any statute or contract requires an  
6 employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage  
7 while purporting to pay the wage designated by statute or by contract.”

8           58. IBM secretly underpays commission wages while purporting to follow the  
9 commission rates designated by contract in violation of Section 223. In fact, from 2013 to 2015,  
10 IBM secretly underpaid its sales representatives over \$40,000,000 nationwide, which includes  
11 sales representatives residing in California.

12           59. Labor Code Section 2751 states, in pertinent part: “Whenever an employer enters  
13 into a contract of employment with an employee for services to be rendered within this state and  
14 the contemplated method of payment of the employee involves commissions, the contract shall be  
15 in writing and set forth the method by which the commissions shall be paid.”

16           60. IBM relied on methods for the computation and payment of commissions that are  
17 not set forth in the commissions contract in violation of Section 2751. In particular, IBM  
18 arbitrarily capped Mr. Beard’s commissions, despite written promises as part of his compensation  
19 plan that his commissions were uncapped.

20           61. Individually and collectively, Labor Code Sections 221, 223, and 2751 and Civil  
21 Code Section 1668 invalidate IBM’s illegal compensation plan provisions and give rise to  
22 Plaintiff’s claim for unpaid wages under the valid and enforceable terms of their written  
23 commissions contracts.





1 would not otherwise have sacrificed had he known that IBM would not pay him the commissions  
2 he earned.

3 69. Accordingly, Plaintiff has suffered injury in fact including lost money as a result of  
4 Defendants' misrepresentations.

5 70. IBM should be made to disgorge these ill-gotten gains and to restore to Mr. Beard  
6 the wrongfully withheld wages to which he is entitled, as well as interest on these wages.

7 71. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts or practices  
8 by Defendant under Cal. Bus. & Prof. Code § 17200 *et seq.*

9 72. Plaintiff requests that this Court enter such orders or judgments as may be  
10 necessary to enjoin IBM from continuing its unfair, unlawful, and/or deceptive practices and to  
11 restore to Plaintiff any money it acquired by unfair competition, including restitution and/or  
12 restitutionary disgorgement, as provided in Cal. Bus. & Prof. Code § 17203 and Cal. Bus. & Prof.  
13 Code § 3345; and for such other relief set forth below, including, but not limited to Plaintiff's  
14 attorneys' fees.

15  
16  
17 **THIRD CLAIM FOR RELIEF**  
18 **(Race Discrimination in Violation of FEHA Cal. Govt. Code § 12940 *et seq.*)**

19 73. Plaintiff re-alleges and incorporates the prior paragraphs of this Complaint as if  
20 fully set forth herein.

21 74. Mr. Beard is an African American.

22 75. IBM engaged in the conduct set forth above based, in part, on Mr. Beard's race.  
23 Specifically, IBM capped Mr. Beard's commissions but did not cap commissions similarly  
24 situated white sales employees.

25 76. IBM's conduct violates the California Fair Employment & Housing Act and has  
26 caused injury to Mr. Beard in that he has received far less in earned compensation than he is due.  
27  
28

78. Further, the conduct was engaged in by IBM senior managers and condoned and ratified by other senior managers and officers of the company and was done so with malicious and fraudulent intent. Accordingly, punitive damages are warranted in an amount to be proven at trial.

9                   79.     Mr. Beard has satisfied the requisite administrative requirements necessary in order  
10 to pursue this matter in court.

**FOURTH CLAIM FOR RELIEF**  
**(Equal Pay Violation in Violation of California Labor Code 1197.5)**

**13** 80. Mr. Beard is African-American.

81. Mr. Beard performed equal work on a job requiring equal skill, effort, and responsibility as certain non-African American employees employed by IBM, and performed such job under similar working conditions.

82. IBM treated Mr. Beard's compensation differently than it treated the compensation of non-African American employees.

83. IBM did not treat Mr. Beard's compensation differently based (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a bona fide factor other than race.

84. Mr. Beard suffered damages as a result of IBM's violation including the loss of compensation, and is entitled to recover such wages, including interest thereon, and an equal amount of liquidated damages.

27 85. Mr. Beard is also entitled attorneys' fees.

**FIFTH CLAIM FOR RELIEF**  
**(Unjust Enrichment)**

86. Plaintiff re-alleges and incorporates the prior paragraphs of this Complaint as if fully set forth herein.

87. To the extent that there was no written contract and to the extent that there was no oral or implied contract, then Mr. Beard alleges a claim for unjust enrichment.

88. At the specific request of IBM and for its use and benefit, Mr. Beard has performed work for IBM in the form of making sales of its software and services.

89. The value of the work performed for IBM by Mr. Beard for which he has not been paid is *at least* \$2,491,234, although the exact amount is for the jury.

90. During and since the performance of the work by Mr. Beard, IBM has failed to pay him and there is due and owing to Mr. Beard from IBM, a principal sum amount of *at least* \$2,491,234.

91. Despite Mr. Beard being owed in excess of another \$2,491,234, IBM has failed and refused to pay the same or any part of it.

92. In the alternative to the claim for breach of contract, and as a result of IBM's refusal to pay Mr. Beard the above-stated sum due and owing to him, IBM has become unjustly enriched in the amount of *at least* \$75,000.

**SIXTH CLAIM FOR RELIEF**  
**(Fraudulent Misrepresentation)**

93. Plaintiff re-alleges and incorporates the prior paragraphs of this Complaint as if fully set forth herein.

94. IBM, through its agents, represented to Mr. Beard that his commissions would not be capped, in at least the following instances: (1) the PowerPoint, which, upon information and belief, was sent to Mr. Beard after he accepted his 2017 IPL, and was always available via the

1 intranet; and (2) the statements of IBM executives at sales meetings that commissions would not  
2 be capped.

3 95. Those representations were false.

4 96. Upon information and belief, those representations were false when made and IBM,  
5 through its agents, knew that they were false when made. IBM intended to deceive Mr. Beard in  
6 making those misrepresentations. Simply put, IBM knew that Mr. Beard's commissions might be  
7 and would be capped, even though it told him in all of these instances that they would not be  
8 capped.  
9

10 97. Indeed, both of Mr. Beard's managers understood what IBM did to him to  
11 constitute a cap on his earnings.

12 98. Mr. Beard reasonably and justifiably relied on the representations of IBM.  
13 Notably, some or all of the representations were made after Mr. Beard signed the IPL, including  
14 those in the PowerPoint, and those by IBM executives in sales meetings. Mr. Beard reasonably  
15 and justifiably relied on the representations by, among other things, continuing to work hard and  
16 sell as much software and services as possible for the benefit of IBM. Had Mr. Beard known that  
17 he would not be paid what he was promised and what he expected, he would have worked  
18 differently at IBM, in commensuration with his actual compensation, and/or he would have sought  
19 another job that paid him what his efforts were worth and/or did not cap commissions. Had Mr.  
20 Beard known that he would be capped as he was, he would have worked his deals differently at  
21 IBM so as to maximize his compensation.  
22  
23

24 99. Mr. Beard was damaged by IBM's fraudulent statements in an amount exceeding  
25 \$75,000.

26 100. Further, the fraudulent conduct was engaged in by IBM senior managers and  
27 condoned and ratified by other senior managers and officers of the company and was done so with  
28

1 malicious and fraudulent intent. Accordingly, punitive damages are warranted in an amount to be  
2 proven at trial.

3 **SEVENTH CLAIM FOR RELIEF**  
4 **(Alternative Claim - Negligent Misrepresentation)**

5 101. Plaintiff re-alleges and incorporates the prior paragraphs of this Complaint as if  
6 fully set forth herein.

7 102. Mr. Beard alleges this claim in the alternative to the claim for fraudulent  
8 misrepresentation.

9 103. IBM, through its agents, represented to Mr. Beard that his commissions would not  
10 be capped, in at least the following instances: (1) the PowerPoint, which, upon information and  
11 belief, was sent to Mr. Beard after he accepted his 2017 IPL, and was always available via the  
12 intranet; and (2) the statements of IBM executives at sales meetings that commissions would not  
13 be capped.  
14

15 104. IBM's agents made the representation negligently, without exercising the care that  
16 a reasonable person would exercise in the circumstances. IBM made the representations with the  
17 knowledge and intention that Mr. Beard rely on the statements, and he reasonably and justifiably  
18 relied on the representations of IBM.  
19

20 105. Notably, some or all of the representations were made after Mr. Beard signed the  
21 IPL, including those in the PowerPoint, and those by IBM executives in sales meetings. Mr. Beard  
22 reasonably and justifiably relied on the representations by, among other things, continuing to work  
23 hard and sell as much software and services as possible for the benefit of IBM.  
24

25 106. Had Mr. Beard known that he would not be paid what he was promised and what  
26 he expected, he would have worked differently at IBM, in commensuration with his actual  
27 compensation, and/or he would have sought another job that paid him what his efforts were worth  
28

1 and/or did not cap commissions. Had Mr. Beard known that he would be capped as he was, he  
2 would have worked his deals differently at IBM so as to maximize his compensation.

3 107. Indeed, both of Mr. Beard's managers understood what IBM did to him to  
4 constitute a cap on his earnings.

5 108. IBM owed Mr. Beard a duty of care in making the representations.

6 109. Mr. Beard reasonably and justifiably relied on the representations of IBM.

7 110. Mr. Beard was damaged by IBM's negligent misrepresentations.

8 111. Mr. Beard has been damaged by IBM's negligence in an amount exceeding  
9 \$75,000.00.  
10

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Mr. Beard prays the Court for the following relief:

13 1. That Mr. Beard have and recover from IBM for violations of the California Labor  
14 Code in the amount exceeding \$75,000, plus interest, costs, and attorneys' fees as allowed by law;  
15

16 2. That Mr. Beard have and recover from IBM for violations of the California Unfair  
17 Competition Law injunctive relief authorized by Business and Professions Code Sections 17202  
18 and 17203 and restitution of his improperly withheld commissions, including interest, costs, and  
19 attorneys' fees as allowed by law;  
20

21 3. That Mr. Beard have and recover from IBM for violations of the California Fair  
22 Employment and Housing Act in the amount exceeding \$75,000, plus interest, costs, and  
23 attorneys' fees as allowed by law;

24 4. That Mr. Beard be awarded liquidated damages pursuant to the California Labor  
25 Code;  
26  
27  
28

## PLAINTIFF DEMANDS A TRIAL BY JURY.

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